APPENDIX

No. 81-5543
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JAMES M. HENRY,
Defendant-Appellant.

Before: BROWN and KENNEDY, Circuit Judges; and CECIL, Senior Circuit Judge

Defendant-appellant appeals his conviction for possession of a firearm by a felon in violation of 18 U.S.C. §§1202(a)(1) and 922(h)(1). He alleges that the government's amendment of the indictment was improper and that the admission of certain evidence was improper and prejudicial. For the reasons stated herein, we reject appellant's claims and affirm his conviction.

Defendant Henry and his friend Trotter were visiting defendant's family in Tennessee. During the day Henry and Trotter engaged in target practice with a gun borrowed from defendant's father. An old boyhood friend of defendant's, one Chambers, stopped by and invited Henry and Trotter to a ballgame. Trotter soon tired of the game and went to have the car washed. On the way he had a car accident. The policemen investigating the accident returned with Trotter to the ballpark to speak with Henry. Henry agreed to accompany them to the police station but indicated that the first had to speak with Chambers. He walked right past Chambers

and went to Chambers' truck. There the police officers testified they saw the defendant lift something from under his shirt and place it in the truck. This object, it may be inferred, was the gun for possession of which defendant was charged. Henry testified that he was merely retrieving the gun from Chambers' truck's front seat, where it had accidentally been placed during Chambers' visit to the Henry household. Henry claimed he wanted to make sure the gun would be returned to his father. Mrs. Chambers testified that she did not remember seeing the gun in the truck on the way to the ballpark, although she and several of her children had ridden in the front seat.

In the first indictment, the defendant was charged with the violation of the aforementioned statutes. The prosecutor offered to drop the count alleging violation of § 922(h)(1) in return for a guilty plea on the other count. The defendant refused. After this refusal, the prosecutor received a certified copy of an indictment pending against the defendant in Georgia. The prosecutor then had issued a superseding indictment which repeated the charges in the first indictment but added the additional fact of the Georgia indictment. No evidence was admitted during trial on the substance of the Georgia indictment.

The defendant claims that the superseding indictment was motivated by his refusal to plea bargain. The government claims that it amended the indictment to ensure that the jury did not exonerate the defendant simply because his previous felony conviction was over ten years old.

It is clear that the superseding indictment does not change the offense for which defendant was charged nor the potential penalty upon conviction. The new indictment merely increased the govern-

ment's chances of conviction by adding another factual element to the case. In **Bordenkircher v. Hayes,** 434 U.S. 357 (1978), the Supreme Court ruled that there was no violation of due process when the prosecutor brought more serious charges after the defendant refused the proffered plea bargain. The Court made clear that the threat of reindictment was relevant to due process only if the new charge "brought an additional and more serious charge...." **Id.** at 360. Here the charge in the superseding indictment was identical; only an additional factual element was added. "*[I]*n the 'give-and-take' of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer." **Id.** at 363. **See also United States v. Andrews,** 633 F.2d 449, 453 (6th Cir. 1980) (en banc). **cert. denied.** 450 U.S. 927 (1981) (prosecutorial vindictiveness relevant only where there is an "augmentation of the charges" by the prosecutor); **United States v. Motley,** 655 F.2d 186 (9th Cir. 1981) (prosecutor's decision to reformulate the charges after mistrial, to increase the chance of conviction without increasing the potential severity of the charges, was proper). Even if some prosecutorial vindictiveness could be found from the facts of this case, the prosecution has rebutted it by showing a justification for the indictment change. **Andrews, supra,** at 456 n. 10.

Defendant also claims that the court admitted certain evidence as constituting prior bad acts in violation of Fed. R. Evid. 404(b). These "bad acts" included testimony correctly identifying defendant's name which defendant had legally changed prior to trial, evidence indicating that at the time of his arrest defendant was carrying $2000 in cash, and testimony which indicated that defendant had lied

to his father about the amount of money which he was carrying. Defendant's claims are meritless.

The testimony concerning the $2000, even if that could be considered a "bad act," was relevant to provide a motive for the defendant's possession of the gun. It served to rebut the defendant's claim of innocent possession. Similarly, the brief reference to defendant's name change was neither a bad act or prejudicial to defendant. Certainly, the prosecution has the right to inform the jury as to the defendant's proper name. Finally, the evidence concerning defendant's misstatements to his father serve to undermine the defendant's credibility and credibility was crucial to the jury's evaluation of the defendant's defense.

Accordingly, the defendant's conviction is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman, Clerk

John P. Hehman, Clerk

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Upon consideration of the petition for rehearing filed herein by the appellant, the Court concludes that all of the questions addressed in the petition for rehearing were fully considered upon the original submission and decision of this case.

It is therefore ORDERED that the petition for rehearing be and it hereby is DENIED.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman, Clerk

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